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No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC.; THE SUPERIOR OIL COMPANY; CAROLINE HUNT SANDS and LOYD B. SANDS; PLACID OIL COMPANY; MARGARET HUNT HILL, Trustee for Hassie Hunt Trust; J. RAY MCDERMOTT & CO., INC.; OCEAN DRILLING & EXPLORATION COMPANY; J. R. FRANKEL, ET AL.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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August 25, 1965

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OPINIONS BELOW

The opinion of the court of appeals (R. 619-42) is reported at 335 F.2d 1004. The opinion and order of the Federal Power Commission (R. 549-93) is reported at 30 FPC 283.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on August 14, 1964 (R. 643). The petition for a writ of certiorari was filed on November 12, 1964, and was granted on March 8, 1965 (R. 646), 380 U.S. 931. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. In passing upon producer certificate applications under Section 7 of the Natural Gas Act, is the Federal Power Commission required, prior to the imposition of a price-reducing condition, to receive and evaluate cost and other evidence of the type normally considered in a rate hearing under Sections 4 and 5 of the Act where (a) receipt of such evidence would, by converting the certificate hearing into a rate hearing, make it impossible to process certificate applications, (b) the evidence thus received would be duplicative of evidence being received in the rate proceedings currently pending before the Commission, and (c) Commission imposition of a price-reducing condition in the certificate in no way bars the producer from subsequently filing for and collecting his initial contract price pending the outcome of the rate proceeding?

2. Where, following judicial reversal of its earlier unconditional certifications of high-priced producer sales, the Federal Power Commission on remand determines that the initial price should have been conditioned to a lower, "in-line" level, does the Commission have power to require the producers to refund

amounts in excess of the "in-line" level previously collected under the judicially invalidated certificates?

3. In issuing certificates of public convenience and necessity under Section 7 of the Natural Gas Act, does the Federal Power Commission have power to impose a condition barring for a limited period of time (during which it is anticipated that the just and reasonable area rate will be determined) future rate increase filings to levels which, because of their price-triggering effect on other contracts, will have a disruptive influence on gas costs and an adverse effect on the ultimate consumer?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out in the appendix, *infra,* pp. 1a-5a.

STATEMENT OF THE CASE

Background—In June 1957—two months before the first of the contracts involved in the present appeal was executed—the Federal Power Commission issued unconditioned certificates authorizing the Cities producers to undertake a major new sale of gas for resale in interstate commerce from fields offshore Southern Louisiana at an initial price of 21.4¢ per Mcf plus tax reimbursement. *Continental Oil Co.,* 17 FPC 880. Two years later, this Court unanimously reversed the Commission's action, setting aside the unconditional certification on the ground that the 21.4¢ price was out of line and remanding with directions to the FPC to hold the line on initial prices. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360

U.S. 378 (1959). On remand, further hearings were held, and in January 1962 the Commission ruled that the appropriate line in Southern Louisiana was not the 21.4¢ per Mcf sought by Catco but rather 18.5¢ per Mcf (plus 1.5¢ tax reimbursement where applicable). Accordingly, the Commission issued new certificates limiting the initial price to 18.5¢ per Mcf and requiring full refunds of all excess amounts previously collected under the invalid certificates. *Continental Oil Co.*, Op. 351, 27 FPC 96.[1]

In the brief period (September 1958-August 1959) between the Commission's original unconditional certification of Catco and this Court's reversal and remand, the Commission, in six separate formal hearings involving a total of 69 producer applications, followed its original erroneous Catco standard and issued unconditioned certificates for Southern Louisiana sales at initial prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. On appeals taken by petitioner and others, the Commission's repetitions of its Catco error were remanded by this Court and by the

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[1] Appeals from Opinion 351 were taken both by the Catco producers, 9th Cir. No. 17909 *et al.*, and by the Public Service Commission of New York, 9th Cir. No. 17999; the former contended the price line was too low and challenged the refunds, while the latter contended the price line was too high. Prior to briefing of the appeal, however, a settlement was reached (later approved by the Commission, 28 FPC 1090), and the appeals were withdrawn. Under the terms of the settlement, (1) the 18.5¢ price was confirmed, (2) refunds were reduced to two-thirds, (3) the Catco producers waived their right to file for future increases pending the outcome of the area rate proceeding, and (4) provision was made for settlement, on similar terms, of three other substantial sales by the Catco producers.

Courts of Appeals for the Third, Fifth, Ninth, Tenth, and D.C. Circuits.[2]

Subsequently, by order issued March 7, 1962, the Federal Power Commission consolidated all 69 of the remanded producer dockets, together with five related dockets, for further proceedings, 27 FPC 482 (R. 409); see also 27 FPC 15 (R. 395). In its order, the Commission noted (1) that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in Southern Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable, and (2) that the consumer interests, who had been successful in the earlier appeals, were urging that the remanded proceedings be disposed of, without further delay, on the basis of the revised Catco determination. Though

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[2] The original Commission opinions, and the court reversals, are as follows:

(1) *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958); *aff'd sub nom. United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (3rd Cir. 1959), *summarily rev'd sub nom. Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

(2) *Texas Gas Transmission Corp.*, Op. 327, 22 FPC 378 (1959), *rev'd Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880, 882 (1961).

(3) *California Co.*, 22 FPC 252 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879, 881 (1961).

(4) *Sun Oil Co.*, 22 FPC 351 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U.S. 823 (1961).

(5) *Sunray Mid-Continent Oil Co.*, 22 FPC 361 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961).

(6) *Superior Oil Co.*, 22 FPC 369 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U.S. 965 (1961).

conceding that there was merit to the consumer position, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard" (R. 415), and accordingly set the consolidated proceeding for hearing.

Prior to the commencement of the remanded hearings, however, conferences were held between a number of the producer applicants and the intervenors, and proposed settlements were entered into and submitted to the Commission for its approval; approval was forthcoming on July 30, 1962, 28 FPC 247. Although these settlements covered the bulk of the remanded applications, some producers—including respondents here—were unwilling to accept the settlement terms, and hearing on their remanded applications was held before an FPC examiner on June 18-21, 1962.

At the outset of that hearing, the producers sought to introduce what the examiner described as "a tremendous mass of cost-type, economic and financial evidence" (R. 495). On motion of certain of the intervenors, supported by the Commission staff, the examiner ruled that such evidence was inadmissible. Evidence on the level of prices in Southern Louisiana during the period 1954-1962 was admitted, however, and was cross-examined.

The Commission's Determination—On December 7, 1962 the examiner issued his decision (R. 490-540), in which he concluded that the in-line price for the contracts here involved was 18.5¢ per Mcf plus 1.5¢ tax reimbursement where applicable, and he directed that the producers refund with interest all amounts previously collected in excess of the in-line levels of 18.5¢ and 20¢. Accepting, in the main, all of the examiner's

findings and conclusions, the FPC, by decision issued July 9, 1963, (1) unanimously sustained the examiner's exclusion of cost data, (2) unanimously sustained the examiner's finding that the in-line level for the contracts here involved was the 18.5¢-plus-tax figure previously determined to be appropriate in the remanded *Catco* proceeding, 27 FPC 96 (1962), and (3) with one Commissioner dissenting, ordered the producers to refund amounts in excess of 18.5¢-plus-tax previously collected under the judicially invalidated certificates. In addition, on the basis of its finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread price triggering throughout Southern Louisiana, the Commission imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967 or until the conclusion of the pending Southern Louisiana area rate proceeding, AR61-2, whichever is earlier.

Decision of the Court Below—On August 14, 1964, the Court of Appeals for the Fifth Circuit reversed the Commission on each of the principal issues in the case. Although stating that this Court's *Catco* decision, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), was "no doubt . . . significant and binding, and we accept it without any effort to whittle it down," the court below sharply criticized the Commission's application of the "in-line" concept articulated in *Catco*, concluding that the Commission "has no power to deny the [certificate] application solely on the ground that the price is not 'in-line.'" Before the Commission may deny or condition a certificate application based on an out-of-line price, the court held, it must consider all factors bearing upon public convenience and necessity. One of the

most critical factors, according to the court, is the nature of the demand for natural gas—"the insatiable energy requirements" resulting from the fact that "population is increasing at explosive rates"—and "the decisive question then becomes what price will it take to get the needed gas?" Accordingly, concluded the court, the Commission committed reversible error in refusing to receive evidence of supply and demand.

Similarly, the court held that the cost-of-service data (of a type that would be relevant in a rate proceeding under Section 4 or 5 of the Act) proffered by the applicants on remand was relevant *as a matter of law* in determining public convenience and necessity. While twice conceding that the Commission is not required under Section 7 to enter into a "full dress § 4 or § 5 rate hearing," the court suggested that, through "resourceful ingenuity," the Commission could in a Section 7 proceeding conduct, in effect, an investigation into the just and reasonable rate without actually holding a rate hearing.

With respect to the Commission's imposition of a partial moratorium on rate increase filings, the court held, as it had in reversing a Commission-imposed moratorium in a temporary certificate in *Hunt* v. *F.P.C.*, 306 F.2d 334 (1962), that, however desirable the goal, imposition of a moratorium constituted an improper attempt by the Commission to supersede Section 4. The court below distinguished the subsequent reversal of its *Hunt* opinion by this Court, *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964), on the ground that the later opinion makes a critical distinction between temporary and permanent certificates; the court below concluded, in fact, that *Hunt* now requires that "the more sweeping statements made in Catco where

reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates" (emphasis in original).[3]

Turning to the refund issue, the court below agreed that the producers were not entitled "to retain . . . what was obtained under invalid orders." In the court's view, however, this provided "no reason why the producers should be required . . . to refund the difference between the amount collected and the conditioned price as soon as it is determined"; rather it would permit the producers to retain the excess revenues pending determination of the just and reasonable rate. The court found this procedure necessary in order to prevent the consumer from obtaining "an undeserved windfall," which, according to the court, would occur should it ultimately be determined that during the period that the excess rates were collected the just and reasonable rate was higher than the in-line price. "Nothing in the law," says the court below, "should encourage that result or its possibility."

SUMMARY OF ARGUMENT

In its landmark *Catco* decision, this Court held that the consumer-protective purpose of the Natural Gas Act required the Federal Power Commission to give "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7" of the Act, 360 U.S. at 391, in order to assure that rates for new interstate sales would be consistent with the public interest. Though accepting the Commission's

[3] The conclusion of the court below is remarkable in that the *Catco* case involved only permanent certificates, not temporary certificates. See note 18, *infra*, p. 35.

argument that a "just and reasonable" rate hearing was neither legally required nor administratively feasible as a prerequisite to Section 7 certification, the Court suggested that the Commission could and should discharge its statutory responsibility in this area through the exercise of its power to attach conditions to the certificates it issues. Specifically, the Court stated:

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. at 391.

Responsive both to the general tenor and the specific suggestion of *Catco,* the Commission evolved a new policy for handling producer certificate applications, and, with one exception (the refunds arising out of the earlier remands), the present case is a typical example of that policy. In scrutinizing initial price proposals, the Commission treats two issues as crucial: (1) Is the price out of line with the pattern of initial prices set by previously certificated sales? and (2) Will certification of the proposed sale result in a triggering of general price rises either immediately upon certification or within a few years thereafter? If both of these questions can be answered negatively, and assuming the other, non-price elements of public convenience and necessity have been met, the application is granted and an unconditioned permanent certificate is issued. But where either or both of these price questions are answered affirmatively, appropriate conditions, designed to correct the proposal so that it

will conform to the public interest, are imposed. Thus, where, as here, the proposed price is out of line, the certificate is conditioned upon a reduction to the in-line level. And where, as here, the contract schedule of future price increases would, if filed, trigger a general price rise under existing contracts, a rate-filing moratorium is imposed, to remain in effect pending the conclusion of the area rate proceeding for the particular producing area.

I

The Commission acted well within the scope of its discretion in choosing, as its initial-price-conditioning level, the pattern set in contracts which had previously been permanently certificated (excluding from the reference group, of course, any certifications made under the erroneous pre-*Catco* standards). Since the in-line level was in no way dependent upon a "just and reasonable" rate finding of the type required in a rate proceeding under Sections 4 and 5, evidence proffered by the applicants bearing on the "just and reasonable" rate was not relevant and, in view of the delay and complication which admission of such evidence would entail, was properly excluded. Moreover, the exclusion of such data from the certificate case, while permitting reasonably prompt disposition of the certificate application, works no hardship on the producer, who, upon acceptance of a certificate conditioned as to initial price, remains free to file under Section 4 for an increase to his original out-of-line contract price, and to collect that price, subject to refund, pending the outcome of the concurrent area rate proceeding, in which all evidence relevant to a determination of "just and reasonable" rates is, of course, admissible.

In holding that the in-line level was *not* a proper initial-price-conditioning standard under *Catco,* the court below not only misread this Court's decision, but did so in a way which totally frustrates the purpose of the Act to provide consumers with a complete, permanent and *effective* bond of protection against excessive rates and charges. The conditioning standard required by the court below—"just and reasonable" rate in light of supply-demand factors—would convert every contested certificate case into an area rate proceeding, and would make the certificate cases as nigh interminable as the rate cases have proven to be.

II

The court below agreed that in the circumstances of this case—where the producer applicants had commenced selling their gas pending appeal of the original unconditioned certificates—the Commission had power to order refunds of amounts collected in excess of the proper price-conditioned level. However, in view of its holding that the proper conditioning level was the "just and reasonable" level and not the in-line level, the court held that refunds should be required only to the extent that the amounts previously collected exceeded the "just and reasonable" rate.

It is obvious that the court of appeals' holding on refunds is merely an application of its erroneous holding on the proper conditioning standard, discussed above. Since the in-line level chosen by the Commission for conditioning was a proper standard, it follows that the measure of refunds ordered by the Commission—the excess above the in-line level—was also proper. The Commission's result is wholly appropriate and indeed was required by the nature of the

earlier judicial reversals of unconditional certification, for it places all parties in the same position they would have been in had the Commission in the first instance issued valid certificates, i.e., certificates appropriately conditioned as to price.

III

On finding that the filing of rates in excess of 23.55¢ per Mcf would trigger a general price rise in the Southern Louisiana producing area, the Commission reacted responsibly by conditioning the certificates to prohibit the filing of increases above this triggering level pending the outcome of the Southern Louisiana area rate proceeding. The Commission's power to bar, at the very outset, escalator clauses which would permit manipulation of prices upward in a way that would defeat effective regulation was suggested by this Court at least as early as *Catco,* and was specifically confirmed in two very recent decisions—*F.P.C.* v. *Hunt,* 376 U.S. 515 (1964), and *F.P.C.* v. *Texaco Inc.,* 377 U.S. 33 (1964).

ARGUMENT

Introduction—During the past decade no problem under the Natural Gas Act has been more hotly litigated—and certainly none has received more judicial attention—than the standards and procedures which should govern the Federal Power Commission's grant of certificate authority to a natural gas producer to undertake a new sale in interstate commerce.

The statutory language is simple enough. Section 7(c) of the Act provides that before a sale of natural gas in interstate commerce for resale may be made, the seller must obtain "a certificate of public con-

venience and necessity issued by the [Federal Power] Commission authorizing such act"; such certificate may be issued only after notice and hearing.[4] Section 7(e) provides that a certificate shall be issued to qualified applicants if it is found (1) that the applicant is able and willing to render the proposed service and to conform to the provisions of the Act and (2) that the proposed sale, "to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." Section 7(e) also authorizes the Commission to attach to any certificate "such reasonable terms and conditions as the public convenience and necessity may require."

The explicit statutory standard, then, for determining whether a given new sale should be authorized is whether that sale is required by the public convenience and necessity. This is obviously a broad standard, whose specific interpretation and application must depend on the nature of the problem. It is to that problem that we now turn.

Following this Court's 1954 ruling in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, that the FPC had the statutory responsibility for regulating interstate sales by natural gas producers, the Commission was faced with two major problems—first, to determine the just and reasonable rates, under Sections 4 and 5 of the Natural Gas Act, for producer sales in interstate commerce; and, second, to develop a standard which would permit new sales to be made under pricing arrangements that would protect all interests pending

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[4] An exception to the notice and hearing requirement is made for temporary certificates, which Section 7(c) authorizes the Commission to issue "in cases of emergency, to assure maintenance of adequate service or to serve particular customers."

determination of the just and reasonable rates. Inasmuch as the determination of just and reasonable rates has proven to be "nigh interminable"[5]—it was not until August 5, 1965, eleven years after *Phillips*, that the Commission arrived at its first and to date only such determination[6]—the Commission quite early ruled that it was not administratively feasible to determine the just and reasonable rate in a certificate case. From this, it concluded that it should grant unconditional certification, even where the proposed new rate exceeded the prior "going rate" in the area, and it sought to justify its action by reasoning that the higher price thus certificated could be tested in a subsequent rate investigation, instituted under Section 5 of the Act, and could be reduced (albeit prospectively only) if found excessive. In the landmark *Catco* case, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), this Court found the Commission's reasoning unconvincing, since unconditional certification of an out-of-line price would permit the applicant to collect and retain that price, without any possibility of refund should the price prove to be excessive, during the long period between certification and the ultimate conclusion of the Section 5 investigation. Accordingly, the Court directed that "where the proposed price is not in keeping with the public interest because it is *out of line*," the Commission should impose a rate condition in order that

> "the consuming public may be protected while the justness and reasonableness of the price fixed

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[5] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 at 389 (1959).

[6] *Permian Basin Area Rate Proceeding*, Op. 468 (August 5, 1965).

by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to *hold the line* awaiting adjudication of a just and reasonable rate." 360 U.S. at 391-92. (Emphasis added.)

What is significant for present purposes is that this Court's *Catco* decision did *not* condemn or impugn in any way the FPC's administrative determination that it was not possible at the time of initial certification to conduct an investigation as to the just and reasonable rate for the proposed new sale; rather the Court held that, assuming such a determination is not possible, the Commission must use its conditioning power to protect the consuming public pending the outcome of the subsequent rate investigation.

Moreover, as Judge J. Skelly Wright aptly noted in discussing the *Catco* decision, the Commission's use of price-limiting conditions in certificating new sales "does not foreclose a company from obtaining an increase under Section 4" and from collecting the increased rate, subject to refund, pending the outcome of a determination, in a Section 4 proceeding, of the proper rate for the sale, *Atlantic Refining Company* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963). Thus, even though a price condition is imposed in the certificate, the producer nevertheless remains free to charge and collect the initial price set forth in his contract. The practical consequences of an initial price condition become evident at the end of the subsequent rate determination: without such a condition, no refunds would be possible even though it should be demonstrated that the contract price had been excessive, whereas with a condition, refunds, at least down to the conditioning level, would be required of such

excess amounts. It was these considerations which led Judge Wright to conclude: "if the Commission is to err in setting an initial rate, it should err on the low side because the company, under Section 4, can immediately increase the rate, subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refunds in the interim." *Atlantic Refining Co.* v. *F.P.C., supra,* 316 F.2d at 679.

It is true, of course, that as a legal proposition the Commission could, consistent with *Catco,* elect to make a determination of the just and reasonable rate at the time of certification and could certificate at that level even though the rate might be out of line with earlier prices. Thus, in an opinion written a year before this Court's *Catco* decision,[7] Judge Bazelon observed that where a proposed initial price was out of line, the Commission had two alternatives—it could either determine the just and reasonable rate and issue a certificate at that level, or it could impose a rate condition in order to hold the line and protect the public during the period in which the propriety of the rate was being tested. The choice between the two alternatives was for the Commission, Judge Bazelon noted; what the Commission could *not* do was to

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[7] *Oklahoma Natural Gas Co.* v. *F.P.C.,* 257 F.2d 634 at 652-53 (dissenting opinion), *cert. granted,* 358 U.S. 877, *cert. dismissed on petitioner's allegation of mootness,* 358 U.S. 948. A careful reading of Judge Bazelon's opinion in *Oklahoma Natural* and Mr. Justice Clark's opinion in *Catco* reveals a striking similarity in analysis and approach; and there is no question that Judge Bazelon's view has been adopted by the D.C. Circuit, see *Public Service Commission of New York* v. *F.P.C.,* 287 F.2d 146 at 149 (D.C. Cir. 1960), and *Atlantic Refining Co.* v. *F.P.C.,* 316 F.2d 677 at 679 (D.C. Cir. 1963).

grant unconditional certification of an out-of-line price without a finding that the price was just and reasonable. Accordingly, where the Commission has certificated an out-of-line price, its action can be sustained only if it has made the requisite findings of justness and reasonableness; and it was for this reason that in *Catco* this Court searched the record for supporting cost data, 360 U.S. at 392-93. But Mr. Justice Clark very specifically held that the Commission was *not* required to determine justness and reasonableness in the certificate proceeding and that the Commission's certificate responsibilities could be adequately discharged through the use of conditions designed to hold the line, 360 U.S. at 390-92.

In the immediate post-*Catco* era, the Commission initially expressed uncertainty as to the role which rate-case type evidence—i.e. individual-company or industry-wide cost and financial data, trends in supply and demand and their impact on the need for "incentive" price allowances, etc.—should play in a certificate proceeding. Although it had been established that consumer representatives could not require the producer applicants to present evidence of their costs as a prerequisite to certification, *El Paso Natural Gas Co.*, Op. 335, 23 FPC 369 and 23 FPC 610 at 613 (1960), aff'd *Texaco, Inc.* v. *F.P.C.*, 290 F.2d 149 at 157 (5th Cir. 1961), the Commission in a number of early post-*Catco* cases permitted the applicants to present cost data if they desired. However, the Commission soon discovered that rate-case type evidence was not helpful in determining whether a certificate should issue, see, e.g., *Continental Oil Co.* (*Catco*-on-remand), Op. 351, 27 FPC 96 (1962); *El Paso Natural Gas Co.*, Op. 358, 27 FPC 1134 at 1137-38 (1962). Moreover,

since (1) admission of the rate-case data—together with the related cross-examination and rebuttal evidence—would make each certificate proceeding as "nigh interminable" as the rate proceedings were proving to be, and (2) admission of the rate-case data in the certificate proceedings would make the certificate proceedings duplicative of the area rate proceedings, instituted for each major producing area, the Commission ultimately held, in *Skelly Oil Co.*, Op. 362, 28 FPC 401 (1962),[8] that cost-of-service and financial-requirements evidence is not relevant in producer certificate cases.[9] As the Commission subsequently advised Congress, "This precedent-setting opinion has served to simplify independent producer initial service cases and has enabled the Commission to try these applications expeditiously." *Forty-Third Annual Report of the Federal Power Commission*, 1963, p. 13.

Following issuance of the *Skelly* opinion, the Commission and its examiners consistently excluded cost data from producer certificate cases, and the promise of expeditious treatment held out by *Skelly* was realized: the backlog of producer certificate applications was sharply whittled down through a series of consolidated proceedings, in which the hearings concluded

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[8] Affirmed on this point, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963.

[9] These conclusions were not reached in a vacuum, but were the fruit of bitter experience; thus the Commission noted, 28 FPC at 411, that where—as in the remanded *Catco* hearings—cost and financial data had been presented, rebutted, and cross-examined, and detailed findings made, the proceedings had been "complicated [and] long-drawn-out" and the results were "of limited utility."

in a week or two, with the hearing transcript seldom running more than 1500 pages.[10]

Although one would assume that producer applicants would be pleased with an expeditious procedure that would permit them to move their gas into the interstate market promptly and, though deferring a detailed rate investigation to a subsequent proceeding, would permit them to collect their contract prices subject to refund of amounts later found excessive, the fact is that, as here, the producers have opposed the new procedures. The reason is not hard to find. Although no producer may commence a sale until he receives Section 7(c) certificate authority—which requires a hearing in which affected consumer interests may participate—the Commission has, since about the time of this Court's *Catco* decision, followed a practice of routinely issuing *ex parte* "temporary certificates" within a few weeks after the producer application has been filed and long before it is noticed for hearing. These "temporary certificates"—which the Act authorizes only "in cases of emergency, to assure maintenance of adequate service or to serve particular customers"—are frequently issued at out-of-line prices and in many instances contain no provision for refund. Thus, by the time a public hearing is held, the producer is already selling his gas under the temporary certificate, and is receiving a price which is higher than he is likely to receive upon permanent certification; he is obviously in no hurry to have the hearing conclude, and if a side excursion into the just and reasonable level might serve to delay the certifi-

[10] This contrasts with producer rate cases, where the hearings last from one to three years or even longer, and the hearing transcript frequently runs upward of 25,000 pages.

cate hearing for two or three years, so much the better. Moreover, the Commission has held that where it has issued a temporary certificate at an out-of-line price and has failed to include an express refund condition, it will not order refunds at the time it grants permanent certification at the lower in-line level, *Skelly Oil Co.*, Op. 362, 28 FPC 401 (1962). Although this holding has been judicially reversed, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 248-50 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963, the Commission has failed to take action in the remanded *Skelly* case or in any similar case and to date has declined to order refunds of excess amounts collected under an out-of-line but non-conditioned temporary certificate.[11]

In the present case, of course, no temporary certificates are involved, but the situation—and the interest in delay—is much the same. Here the producers have, for some five or six years, been selling their gas, and are selling it today, at the original 23¢ prices certificated by the FPC in 1958-59 and set aside by the courts in 1959-61.

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[11] Although the Commission's issuance of "emergency" certificates as a matter of routine would seem to be a clear contradiction in terms, the Court of Appeals for the D.C. Circuit has sustained the FPC's actions apparently on the theory that the Commission's power to adopt rules and regulations (under Section 16 of the Natural Gas Act) constitutes a separate source of substantive power. *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893 (D.C. Cir. 1964); but see *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953) for a more traditional view.

I. THE COMMISSION ACTED PROPERLY IN CONDITIONING ITS ISSUANCE OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON THE REQUIREMENT THAT THE INITIAL PRICE BE REDUCED TO THE IN-LINE LEVEL OF 20¢ PER MCF.

A. The Commission Was Not Required to Consider Cost and Economic Trend Data In Determining the Conditioning Level For Certificating the Remanded Applications.

Pursuant to the teachings of this Court's landmark *Catco* decision, as amplified by the six subsequent court of appeals decisions reversing FPC unconditional certification of out-of-line prices,[12] the Commission developed new procedures for producer certificate cases, under which applications based on contracts calling for out-of-line prices are certificated on condition that the initial price be reduced to the Commission-determined in-line level.

The in-line conditioning level is fixed by reference to the pattern of prices in the area which have previously been permanently certificated by the Commission and are not suspect or under a cloud; no consideration is given to those factors which the Commission might consider relevant in a rate proceeding—such as evidence of the cost of exploration and production, whether company-wide or industry-wide, and evidence of trends in supply and demand.

There are at least three major reasons why the Commission's rejection of such data in a certificate case is appropriate: (1) Receipt and evaluation of such data would make the certificate proceeding duplicative of the area rate proceedings presently under way for each major area; in the area proceedings, the whole

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[12] The six reversals, set forth *supra* p. 5, are, of course, the very decisions which led to the remanded proceedings under review here.

purpose is to determine the just and reasonable rate, and any evidence directed to that end is, of course, admissible. (2) Since the producer is free, unless he has otherwise disabled himself, to reject the conditioned certificate, and since he is also free, unless barred by a moratorium clause of a type not present here,[13] to file under Section 4 for his initial contract price, no unfairness to the producer can result from deferring the rate determination to a subsequent proceeding. (3) Where vast quantities of gas are regularly being dedicated to the interstate market at prices which are in-line, the Commission is not required to authorize the sale of higher-priced gas, even if the higher prices should be determined to return no more than a fair profit to the proposed seller.

It was for precisely these reasons that the courts of appeals, in sustaining the FPC's post-*Catco* price-conditions—imposed without reference to cost—emphasized that Section 7 and *Catco*

> "permit the Commission to fix the 'in-line' price, not on a basis of cash outlay or replacement cost, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated." *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 246-47 (D.C. Cir. 1964).

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[13] The moratorium clause here does not bar filings from the in-line level of 20¢ to the initial contract price of 23.55¢, though it does bar increases in excess of 23.55¢ before July 1967.

To the same effect, see *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 at 155, 157 (5th Cir. 1961); *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 at 655, 657, 659 (10th Cir. 1963); and *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 680 (D.C. Cir. 1963).

In rejecting this line of cases and reversing the Commission's action here, the court below held that the Commission "has no power to deny the [certificate] application solely on the ground that the price is not in-line", 335 F.2d at 1012 (R. 628), and, by inference, held that the Commission had no power in the present case to issue a certificate on condition that the initial price be reduced to the in-line level. Rather, in the court's view, the Commission was required, as a matter of law, to consider "the extent and nature of supply and demand," 335 F.2d at 1013 (R. 629), and evidence of price trends and of exploration and production costs, 335 F.2d at 1014 (R. 631-32), in order that the Commission might weigh all of these factors in determining whether the requested certificates should be denied, granted outright, or granted subject to conditions.

It is clear that the reasoning of the court below must be rejected.

1. While proceeding from the correct premise that there are a number of elements comprising "public convenience and necessity," the decision assumes that an applicant's failure to meet one of the most important elements—price—may be excused if he more than meets certain other standards. This is patently incorrect. In the first place, the applicant is obligated to satisfy *all* of the requirements, especially price, and his failure to do so would justify denial of the certificate. In the second place, the Commission's condition-

ing power, by permitting the Commission to single out specific defects for correction, avoids confronting the Commission with an all-or-nothing choice, and eliminates the need for "balancing". Finally, the thesis is especially inappropriate here. The court below would presumably permit a higher-than-in-line price if the demand were demonstrated to be very great. But it is precisely when the demand is great that FPC protection against excessive prices is most important.

2. Assuming that supply and demand could affect the matter of public convenience and necessity, it is unrealistic to assume, as did the court below, that the proffered evidence was of a type likely to be meaningful and that without such evidence the Commission would be unaware of the general supply-demand picture. The Commission's day-to-day operations necessarily keep it highly informed, in a most realistic way, of both the need for gas by the various pipelines and of the producers' willingness to sell their gas at the in-line levels. Certainly the Commission's experience, both before issuance of the decision here under review and since, demonstrates that there are vast quantities of gas available at the in-line level in Southern Louisiana—indeed more gas than the pipelines are able to cope with. Within six months of the Commission's decision here, the Commission certificated the two largest sales ever to come before it. Both were from Southern Louisiana fields, and both were based, in essence, on the in-line levels found by the Commission in the present case, *Columbia Gulf Transmission Co.*, 30 FPC 1297 (1963) (sale of 6.1 trillion cubic feet of South Louisiana gas by Humble Oil & Refining Company); *Texas Eastern Transmission Corp.*, 30 FPC 1559 (1963) (sale of 4.4 trillion cubic feet of South Louisiana gas by Gulf Oil Corporation).

3. The standard set up by the decision below, while perhaps conforming to a prevalent view that in administrative hearings all proffered evidence should be admitted "for what it is worth", constitutes a nightmare at both the trial and initial decisional levels. At the trial level, the certificate hearing would necessarily become a complete repeat of the area rate proceeding, notwithstanding the unamplified suggestion of the court below that receipt of cost evidence need not lead to a "full dress § 4 or § 5 rate hearing." 335 F.2d 1014-15 (R. 632). If the producer may present evidence of the type relevant in an area-rate proceeding and if the Commission must consider such evidence, then surely the FPC staff and consumer intervenors will be obliged to cross-examine and rebut the applicant's testimony, and the result will be indistinguishable from a rate hearing. Further, while the decision below would require the Commission to consider supply and demand and cost along with in-line price data, it provides no rational scheme by which the three elements may be blended into a meaningful Commission decision. Suppose a proposed price is out of line by 5¢ per Mcf, that it will not return an unreasonable profit to the particular producer applicant (who is a high-cost producer), and that, as is usually the case, the evidence on supply and demand is conflicting: What price should the Commission find required by public convenience and necessity? Or again, assume the industry-wide cost of exploring for and producing new supplies of gas is 3¢ *lower* than the in-line level, and that current supply exceeds current demand; What finding should the Commission make with respect to price? It is all very well to suggest various factors that might be considered, but unless the precise way in which those factors are to be used

is spelled out, see, e.g. *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir. 1964), the suggestion either calls for a meaningless inquiry, on the one hand, or is an invitation to uncontrollable administrative fiat, on the other.

4. Assuming that a producer applicant under Section 7 has a right, at some point, to have his rate proposal tested by the rate standards of the Act, and assuming further that such standards encompass supply and demand, cost, and trend data, the decision below fails to make clear why the Commission is required, as a matter of law, to consider such data in the certificate hearing rather than in a concurrent or subsequent rate hearing. The administration of the Natural Gas Act is, of course, confided to the Commission, and its choice of procedures, if fair to all parties and consistent with the statutory objectives, will not normally be reversed. See, e.g., *Wisconsin* v. *F.P.C.*, 373 U.S. 294 (1963). The decision below does not suggest that the Commission's deferral of rate-case evidence to the rate case is unfair or that it represents an irrational choice of procedures.

B. The Commission's Finding That The In-Line Level Did Not Exceed 20¢ Per Mcf Is Amply Supported By Substantial Evidence of Record.

Although, in view of its disposition of the exclusion-of-evidence matter, the court below did not pass on the producer contentions that the in-line level for Southern Louisiana is higher than 20¢ per Mcf, we would strongly urge that, with the full record before it, this Court do so and reject the producer contentions on this score, so that these proceedings, pending some eight years, may finally be brought to a conclusion.

The Commission's determination that the in-line level for Southern Louisiana is 18.5¢, plus 1.5¢ tax reimbursement where applicable, is predicated principally on the Commission's finding that the in-line level for the period immediately preceding the erroneous Catco certification of June 1957 was 18.5¢ and 20.0¢. Attacking this result, petitioners below argued, as they did in the earlier appeals in which the Commission's unconditional certifications were reversed, that the line should be determined by reference to the contract prices negotiated at the Catco levels in the period following the Commission's erroneous 1957 Catco order.

Aside from the fact that the matter is *res judicata*, having been decided adversely to the producers *as to these very sales* when these cases were first before the courts four years ago, law and logic are wholly on the side of the Commission's determination. As the Fifth Circuit correctly noted in one of the earlier appeals, in 1954 pipelines were able to contract for new supplies of gas in Southern Louisiana at initial prices of 9¢ to 12¢ per Mcf, *United Gas Improvement Co.* v. *F.P.C.*, 290 F.2d 133 at 136 (5th Cir. 1961). In the fall of 1955, prices leaped from this 9-12¢ plateau to 17-18¢ as the result of the Commission's unconditional certification of new sales to Transcontinental Gas Pipe Line at 16¢ plus 1¢ tax reimbursement, *A. J. Tamborello*, 14 FPC 123, and to Tennessee Gas Transmission Company at 17¢ plus 1¢ tax reimbursement, *Alabama-Tennessee Natural Gas Co.*, 14 FPC 986 at 992-94. The final leap, to 21½¢ plus 2¢ tax reimbursement, was precipitated by the Commission's June 1957 Catco order, but the latter was tempered by this Court in

Catco and *Transco-Seaboard*[14] and by the various courts of appeals in the subsequent UGI-New York Commission cases.

Faced with the problem of determining the in-line level in the remanded Catco proceeding, the Commission might well have utilized the 1954 level of 9-12¢. Nevertheless, in that proceeding, the New York Commission and the other consumer intervenors urged no more than that the line be held to the 17-18¢ plateau reached in *Tamborello* and *Alabama-Tennessee*. Although the Commission determined the line by evaluating new contracts entered into in the two years immediately prior to the negotiation of the Catco contract,[15] it concluded from such data that the in-line base price (i.e., the price exclusive of tax reimbursement) was 18.5¢, rather than 16-17¢ as urged by the intervenors, 27 FPC 96 at 101-02, 108; and, while conceding that the in-line tax reimbursement prior to 1958 had been no more than 1¢, it nonetheless allowed 1.5¢ for this item to reflect a 1958 increase in the state tax, 27 FPC at 109; see also 27 FPC 592 at 594. Thus, the 18.5¢-20¢ level fixed in 1962 by the Commission in *Catco-on-remand* is, if anything, remarkably generous.[16]

But, problems of over-generosity aside, the evidence and arguments presented in the remanded proceedings

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[14] *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

[15] In looking solely to new contracts, of course, the Commission gave no weight to the very substantial volumes of gas being sold during this period under contracts entered into earlier.

[16] Compare the admonition of Judge Wright in *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963), quoted *supra* at p. 17.

here clearly demonstrated—and both the examiner (R. 506-07) and the Commission (R. 557-60) so found—that the only reason the contract prices in the post-*Catco* period were higher than prior to *Catco* was the Commission's error in unconditionally certificating the Catco sales in 1957 and that such prices, therefore, did not provide a proper basis for comparison. The Commission's finding in this regard merits repetition here (Op. 398, R. 558-59, 560):

> "In our opinion, the evidence previously presented in the course of the initial proceedings in these dockets and expanded upon in this reopened proceeding confirms the long-developing conclusion that the field price history in Southern Louisiana was decisively influenced by the *CATCO* transaction, our original decision in *CATCO*, and the widespread attention which that decision reached. Post-*CATCO* there was a new floor to prices at 21.4 cents per Mcf and pipelines either had to meet this price or go without the reserves needed for their expansion programs. * * *
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> "* * * We agree with the finding by the examiner that the record does not show that the 1957-1958 'suspect like prices' at levels above 18.5 cents were not subject to the same infirmities which produced the *CATCO* reversal. It is our opinion, therefore, that the post-*CATCO* field price statistics relied upon by the producers to support their contract prices provide no valid basis for determination of a proper price line in the Southern Louisiana area."

II. IN ORDER TO CARRY OUT THE MANDATE OF THE SEVERAL COURTS OF APPEALS REVERSING UNCONDITIONAL CERTIFICATION, THE COMMISSION WAS REQUIRED, ON REMAND, TO CORRECT ITS EARLIER ERROR BY REQUIRING REFUNDS OF EXCESS AMOUNTS COLLECTED PURSUANT TO THE INVALID, JUDICIALLY REVERSED CERTIFICATES.

Following the Commission's original unconditional certifications in September 1958 and August 1959, timely review proceedings, challenging the initial price level, were instituted by one or more of the present petitioners. While those review proceedings were pending—indeed, in at least one instance after those review proceedings had resulted in reversal—the producers commenced their sales at the 23½¢ prices. For the most part these sales commenced during 1959, so that by the time the Commission decided the remanded proceedings, in mid-1963, the producers had been collecting their out-of-line prices for some four years. In all instances, the effect of these increased prices had been passed on by the pipeline purchasers to their customers.

Accordingly, when the Commission determined, in the order now under review, that the appropriate in-line price was 20¢ and that permanent certification should be conditioned upon the filing of an initial price of 20¢, it also concluded, as indeed it was obligated to, that its original certifications in 1958 and 1959 should have been conditioned at the in-line level of 20¢ and that the amounts which the producers had collected pursuant to the judicially reversed certificates in excess of that level should be refunded, together with appropriate interest.

In the court of appeals, the producers challenged both the Commission's power to order refunds and its right to exercise that power in the present case. Though rejecting these producer challenges, the court below,

consistent with its theory on the appropriate conditioning level, held that the proper measure of refunds was not, as the Commission had ruled, the sum collected in excess of the in-line level, but was the sum collected in excess of the just and reasonable level; thus, the payment of refunds would be deferred until after the Commission had made a determination of the just and reasonable rates for these sales.

This holding on the refund issue, we submit, is not only based on a misunderstanding of the underlying legal theory on which the refunds here involved are premised, it is also inconsistent with the decisions of other circuits and is contrary to the clear policy expressed by this Court that refunds are only partial protection at best and, to be effective, should be ordered as promptly as possible.

The legal theory on which refunds are required where deliveries have been made under high-priced, judicially invalidated certificates is, in essence, one of partial rescission and restitution. In this case, there having been no valid certificates authorizing the sales at 23½¢ per Mcf, the past transactions were contrary to law (specifically, Section 7 (c) of the Natural Gas Act); and since complete bilateral restitution—return of the full purchase price by the seller and return of the gas received by the buyer—is obviously impractical, the next best alternative is chosen: the situation is recast as though the Commission had, in the first instance, issued valid certificates, i.e., certificates limiting the initial price to 20¢. See *Hunt Oil Co.* v. *F.P.C.*, 334 F.2d 474 at 479 (5th Cir. 1964).

Even under Section 4—which specifically ties refunds of increased rates collected thereunder to the portion of the increase found "not justified"—the

courts have made it abundantly plain that, in order for the rate applicant to retain the increased rate, he must prove that the increased rate is just and reasonable *and* that he had a legal right to make the filing, see *United Gas Pipeline Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956). Thus, a rate applicant under Section 4 may be required to make refunds without regard to whether the increased rate is just and reasonable if there was no legal basis for the filing. *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002 at 1010-11 (3rd Cir. 1964). *A fortiori,* where an initial rate schedule filed pursuant to a Section 7 certificate is involved, the sole question is the legality of the filing; where, as here, the filing was void *ab initio,* refunds are required.

Finally, the holding below is in sharp conflict with the policy considerations expressed by this Court in *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), where, at 154-55, it was noted that, in view of the "somewhat illusory" protection which refunds afford to consumers, the Commission has the duty, "where refunds are found due, to direct their payment at the earliest possible moment consistent with due process." Accord, *Wisconsin* v. *F.P.C.*, 373 U.S. 294 at 324 n. (dissenting opinion); *F.P.C.* v. *Hunt*, 376 U.S. 515 at 524-25 (1964). In the present case, the 23½¢ prices have been collected since 1958, a period of seven years; obviously, the longer refunds are delayed, the more illusory is the protection afforded by the refund remedy.

III. THE COMMISSION PROPERLY IMPOSED A MORATORIUM ON RATE INCREASE FILINGS IN EXCESS OF 23.5c PER MCF.

In the order here under review, the Commission made two findings with respect to price levels. First, it found that the in-line level was 20¢, and it condi-

tioned the certificates to reflect this finding. Second, it found that there was a triggering level at 23.55¢, and therefore, in order to prevent extensive triggering of other contracts in the area, at least pending the outcome of the Southern Louisiana area rate proceeding, it imposed a condition prohibiting the producers from exercising any contract right to file rate increases above 23.55¢.[17] Thus, while Opinion 398 requires the producers to reduce their *initial* rate to 20¢, it permits them, upon making that rate effective, to file a rate increase under Section 4 (d) up to the contract price of 23.55¢; the moratorium feature, however, would preclude a *second* rate increase filing *above* 23.55¢ until the conclusion of the area rate proceeding, or until July 1, 1967, whichever is earlier.

The court below reversed the Commission's imposition of the moratorium on the ground that, by this device, the Commission was seeking to "supersede § 4"; the court seemed to regard Section 4 as a Congressionally intended guarantee of the producer's right to file for rate increases under any circumstances. Although the court recognized that its similar reasoning in setting aside a Commission-ordered moratorium in a *temporary* certificate, *Hunt* v. *F.P.C.*, 306 F.2d 334 (5th Cir. 1962), had in turn been reversed by this Court, *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964), it interpreted this Court's *Hunt* holding, that moratoria are proper in temporary certificates, as implying that

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[17] The two different types of conditions thus imposed appear to be responsive to this Court's suggestion that certificate conditions are appropriate both to prevent out-of-line prices *and* to prevent "triggering of general price rises." *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 at 391 (1959).

moratoria are improper in permanent certificates. Such an interpretation is clearly unwarranted.[18]

In the first place, in *Hunt*, this Court specifically noted that "the extent of [the Commission's broad discretionary power to condition certificates in order to hold the line in pricing] in permanent certification is not before us now." 376 U.S. at 526. More important, we believe that the rationale of the *Hunt* decision applies with equal force to sales proposed to be made under permanent certificates. For as the Court noted, "When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of Section 7," Id. at 523; and if he does not like the conditions imposed by the Commission in the certificate tendered to him, he is free to reject the certificate and to sell his gas in the intrastate market or to refuse to sell it and await a better opportunity,

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[18] The court below concluded that in *Hunt* this Court limited the application of its *Catco* decision to cases involving temporary certificates, and it pointed to what is obviously an inadvertent error in this Court's language in *Hunt* where, 376 U.S. at 523, it is stated:

> "This Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra.*"

Actually, there were no temporary certificates involved in the *Catco* case (a Commission proffer of a temporary certificate had been rejected by the producers, see 360 U.S. at 385), and, as the Court's discussion in *Catco* and its summary of that discussion in *Hunt* make clear, the Court was discussing *conditioned* certificates and the scope of the Commission's conditioning power. The confusion in terminology stems from the fact that both a temporary certificate and a conditioned certificate, like a rate subject to refund under Section 4, share a common characteristic—lack of finality.

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. at 387.

Any lingering doubts as to whether the moratorium rule of *Hunt* would be applied to permanent certificates were dispelled by this Court's subsequent decision in *F.P.C.* v. *Texaco, Inc.*, 377 U.S. 33 (1964). That case involved a much broader power than is involved here—the Commission's right to promulgate a rule barring certain price-escalation provisions in producer sales contracts. The Court's language sustaining the Commission's power to prohibit inflationary filings by the broad brush of general rulemaking certainly justifies the Commission's power, in the closely parallel situation here presented, to accomplish similar results on an *ad hoc* basis:[19]

> "Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude; and the legislative history makes clear that its authority reaches that far." 377 U.S. at 42-43.

CONCLUSION

After years of failing to exercise its regulatory powers under Section 7, the Federal Power Commission, at the prodding of consumer interests and in response to the guidance furnished by this Court's *Catco* decision, has finally evolved a reasonably fair and workable program for the issuance of producer certificates

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[19] In *Texaco*, as here, the evil to be avoided was the "vast proliferation of hearings" that would result if the Commission's remedial action were invalidated, 377 U.S. at 44.

—a program which, at long last, promises the consumer the "complete, permanent and effective bond of protection" [20] intended by Congress. That program would be wholly nullified by the decision below.

Petitioner respectfully requests that this Court vacate the judgment of the court of appeals and remand this case to the court below with directions to affirm the decision of the Federal Power Commission.

Respectfully submitted,

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[20] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).